

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MOISES FERNANDEZ

Claimant

VS.

DONDLINGER & SONS CONSTRUCTION CO., INC.

Respondent

AND

MIDWEST BUILDERS CASUALTY MUTUAL CO.

Insurance Carrier

Docket No. 1,065,430

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the September 6, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Diane F. Barger of Wichita, Kansas, appeared for claimant. Eric K. Kuhn of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 20, 2013, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

Claimant asserts that on March 27, 2013, around 5:00 p.m., while employed by respondent he shoveled dirt to lay pipes and felt pain in his left kneecap. Claimant alleged he would keep his feet in one position and twist at the knees to shovel dirt. Claimant went home from work that evening, but did not report an injury to respondent. The next day, claimant returned to work and immediately reported a left knee injury to his supervisor, Brad Reichenberger. Mr. Reichenberger transported claimant to the emergency room at Via Christi Hospital St. Teresa Wichita, Inc., where it was determined claimant had a left knee tibial plateau fracture.

Respondent contends it is unknown how claimant sustained a left lateral tibial plateau fracture. According to respondent, claimant gave several different versions of how

he injured his left knee and was unable to articulate the particulars of how the knee injury occurred. Respondent also argues Dr. David W. Hufford evaluated claimant and opined that digging with a shovel could not cause claimant's left knee injury.

ALJ Klein noted claimant was a simple, hardworking man who speaks no English and stated:

The court preliminarily finds that the claimant sustained a work accident on March 28, 2013 *[sic]* while digging, twisting and throwing dirt with a shovel. The court reaches this conclusion based on the next to last page of claimant's exhibit 2 which are Dr. Mahomed's history notes and claimant's own testimony. The claimant was not aware that he had sustained a work injury until his emergency room visit of March 29 *[sic]*.¹ At that time he provided notice of his injury. It is undisputed that the claimant had an undisplaced tibial plateau fracture. This fracture is an obvious change in the physical structure of claimant's body and the court finds that this change is due to the work activity and that the work injury is the prevailing factor in the claimant's need for treatment.

The court designates Dr. Chris Miller as the authorized treating physician and orders the respondent to pay all outstanding medical bills related t *[sic]* the claimant's injury of March 28, 2013 *[sic]*.²

The sole issue before the Board is whether claimant sustained a left knee injury by accident or repetitive trauma arising out of and in the course of his employment with respondent.

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

In his Application for Hearing, claimant alleged he sustained a left knee injury on or about March 27, 2013, and each working date thereafter. Claimant testified that on March 27, 2013, he used a shovel to excavate two pipes to clean them. He dug dirt with the shovel and, keeping his feet in the same position, would twist to throw the dirt to the side. Just before 5:00 p.m., claimant felt pain just below his left knee. He did not tell the supervisor, because the supervisor was not there.

¹ It appears ALJ Klein was mistaken about the date of claimant's accident and the date claimant sought treatment at the emergency room at Via Christi. The record indicates claimant asserts an accident date of March 27, 2013, and sought medical treatment at the Via Christi emergency room on March 28, 2013.

² ALJ Order at 2.

Claimant left work at 5:00 p.m. and that night had some pain in the left leg. The next morning, March 28, claimant could not move his left leg. When claimant stood up, he felt immediate pain. Claimant's wife helped get claimant's left shoe on and he went to work. Claimant testified that when he got to work, he told his supervisor, Brad Reichenberger, about the left knee injury, but Mr. Reichenberger would not listen. Claimant testified, "I wanted to tell him that I had something here, something was going on and I didn't know what it was either."³ Claimant testified that two other employees of respondent, Mike and another man, tried to bribe claimant not to say he was injured at work.

Mr. Reichenberger took claimant to his house to get a medical card and then onto the emergency room. Claimant testified he questioned Mr. Reichenberger why he was taking claimant to his house: "Why are you taking me there, take me to the hospital. This should be part of work."⁴ Claimant denied telling anyone at respondent that the left leg injury did not occur at work.

Diane Burris, respondent's safety assistant, testified that she investigated claimant's alleged accident. Ms. Burris is a Kansas State Certified Intermediate EMT and a Registered Medical Assistant with 25 years of medical experience, including eight years in a Level I trauma center. As part of her investigation, Ms. Burris spoke to Mr. Reichenberger on several occasions on March 28 and 29, 2013. Ms. Burris testified that on March 29, 2013, she and another of respondent's employees, Mike Mathia, told claimant to use his personal health insurance to pay for the left knee injury, as the injury was not work related. On April 9, 2013, Ms. Burris interviewed several of claimant's coworkers, who indicated claimant made no complaints of left knee pain on the date of the alleged accident.

Mr. Mathia, respondent's Director of Human Resources, testified he did not try to bribe claimant not to file a workers compensation claim. Mr. Mathia also prepared a report concerning claimant's alleged accident. According to Mr. Mathia, claimant was given several options, including pursuing a workers compensation claim, but he chose not to do so.

Mr. Reichenberger, who works for respondent as a superintendent, testified that when claimant arrived at work on March 28, he got out of his truck and leaned against Mr. Reichenberger's truck. Mr. Reichenberger asked what was wrong and was informed by claimant that his left leg was hurt and he did not know what happened, but thought he broke the leg. Claimant denied injuring the left leg in a fall and indicated the left leg hurt when he got out of bed. Mr. Reichenberger was told by claimant that he felt fine when he

³ P.H. Trans. at 15.

⁴ *Id.* at 16.

left work the day before. Mr. Reichenberger spoke English to claimant during the conversation. Mr. Reichenberger then called Ms. Burris to report the incident and she advised him to take claimant to the hospital.

The next day, March 29, Mr. Reichenberger went to claimant's home to check on him. Claimant's children, who were present at claimant's home, were not happy, as they thought claimant's injury was work related. Mr. Reichenberger asked claimant if he had gotten hurt at work, and claimant indicated he felt fine when he came home from work, and when he got up the next morning, had pain in the left leg. Mr. Reichenberger indicated to claimant and his children that the injury could not be turned into workers compensation.

Claimant's daughter, Elizabeth Fernandez, testified that after claimant was injured a meeting took place at respondent's offices and present were claimant, Ms. Fernandez, an interpreter and Ms. Burris. Ms. Fernandez told the interpreter that claimant got hurt when he fell at work. Ms. Fernandez testified she was told by her father that he was injured at work when he fell on March 27.

Medical records from Via Christi indicated claimant was admitted for treatment at 7:29 a.m. on March 28, 2013. The notes indicated claimant's chief complaint was left knee pain beginning at 5:00 a.m. and that claimant noticed the pain at home when he woke up. There was also a note that claimant had "[left] knee pain injury yest @ work."⁵ The notes also indicate claimant denied an injury, but used the knee a lot at work the day before. X-rays of the left knee revealed an oblique fracture line present involving the proximal tibial metaphysis extending from the medial aspect of the metaphysis to the lateral metaphysis and extending to the lateral tibial plateau. The radiologist's impression was joint effusion with a nondisplaced acute proximal tibial fracture.

On March 28, claimant saw Dr. Mohamed N. Mahomed and his physician assistant, Amanda M. Dimitroff. Ms. Dimitroff's notes indicated claimant was out walking when he fell onto his left side and had immediate left knee pain. Dr. Mahomed's notes from the March 28 visit stated, "He was working yesterday on construction site. He was digging and moving large pipe using his knee to dig. Today he notes that he had pain in the knee."⁶ Surgery was recommended by Dr. Mahomed, but claimant did not have the surgery. Dr. Mahomed's notes from a May 9, 2013, visit with claimant indicated the left nondisplaced lateral tibial plateau fracture occurred at work.

At the request of respondent, claimant was evaluated by Dr. David W. Hufford on June 4, 2013. Dr. Hufford indicated that his examination was limited by claimant's long leg

⁵ *Id.*, Cl. Ex. 1.

⁶ *Id.*, Cl. Ex. 2.

cast. Dr. Hufford could not examine claimant's knee, nor the distal structures except for the exposed portion of claimant's left foot. The doctor stated:

His work on March 27, 2013 included extensive digging with a shovel and at no time does he allege that there was one specific moment of injury during this activity. He does state that he noted a sharp, stabbing pain while digging which became gradually worse throughout the day. The simple act of digging with a shovel can not cause an intra-articular tibial plateau fracture unless there is an underlying pathologic bony process at work and this has certainly not been suspected throughout his course of treatment. Therefore, the simple act of digging with a shovel has not caused the tibial plateau fracture. An undocumented twisting injury to the left knee that may have occurred earlier in the morning could possibly have caused the tibial plateau fracture. A non-occupational injury outside of the work setting is certainly a possibility but this factual dispute can not be resolved by any element of my history and examination. . . .⁷

At the preliminary hearing, claimant introduced three articles on fractures of the tibia. One article from the American Academy of Orthopaedic Surgeons indicated a fracture of the upper tibia is most often caused by a single traumatic injury, but can be caused by stress. That same article indicated a stress fracture of the upper tibia would be a minor fracture from unusual excessive activity. It also noted the tibial plateau is made of cancellous bone which has a honeycombed appearance and is softer than the thicker bone of the lower tibia. A fracture of the tibial plateau occurs when a force drives the lower end of the femur into the soft bone of the tibial plateau.

The Home Health Encyclopedia article introduced into the record by claimant stated:

Stress fracture of the tibia occurs in individuals who subject their extremities to repeated trauma. They can arise in otherwise healthy bone that is subjected to excessive loads (as in the marathon runner) or in abnormal bone that is subjected to minor loads (as in osteoporosis). These fractures may be anywhere along the tibial shaft and tend to be either transverse or oblique in orientation.

Fractures of the tibial spine or intercondylar eminence result from violent twisting, abduction-adduction injuries, or direct contact with the adjacent femoral condyle. Either the anterior tibial spine or, less commonly, the posterior tibial spine is affected, and rarely both are involved.⁸

Claimant placed into evidence an article from the Archives of Orthopaedic and Trauma Surgery. The authors of that article found reports of only two cases where a fracture of a lateral tibial plateau was caused by stress.

⁷ *Id.*, Resp. Ex.1 at 2.

⁸ *Id.*, Cl. Ex. 6.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁹ “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”¹⁰

This Board Member concurs with the ALJ that claimant is a simple, hardworking man. Claimant alleges he sustained a left lateral tibial plateau fracture as a result of repetitive work activities. He consistently testified he had pain in his left leg on March 27, 2013, while twisting to shovel dirt. It was uncontroverted claimant did not report the injury to respondent on March 27, because claimant’s supervisor was not available.

At this juncture of the proceedings, claimant has failed to prove that his left lateral tibial plateau fracture resulted from repetitive trauma arising out of and in the course of his employment with respondent. Claimant presented few details about his job duties at respondent. All that is known is that at the time of claimant’s injury, he was shoveling dirt and twisting while doing so. Although claimant worked for respondent since 2001, scant testimony was elicited from him about the work he performed prior to the March 27, 2013, incident. Claimant testified that part of his job with respondent was to shovel dirt for pipes, but not on a daily basis. He was not asked about his other job duties, how many times a week he shoveled dirt or how many hours he shoveled dirt each week.

The medical evidence presented supports respondent’s assertion that shoveling could not have caused claimant’s left lateral tibial plateau fracture. The medical literature placed in the record by claimant indicates a stress fracture of the upper tibia occurs where there is a bony abnormality or when a healthy bone is subjected to severe trauma or excessive repetitive activity.

The medical literature presented by claimant seems to indicate stress fractures usually consist of minor breaks and may occur along the tibial shaft. Claimant’s lateral tibial plateau fracture did not consist of minor breaks and was not along the tibial shaft. As Dr. Hufford pointed out, there was no evidence claimant’s left tibia was abnormal or that his work activity of shoveling dirt caused his left lateral tibial plateau fracture. Simply put, claimant failed to provide sufficient evidence that his repetitive work activities were the prevailing factor that caused his left lateral tibial plateau fracture and need for medical

⁹ K.S.A. 2012 Supp. 44-501b(c).

¹⁰ K.S.A. 2012 Supp. 44-508(h).

treatment. Nor did claimant prove that his left lateral tibial plateau fracture was the result of a traumatic accident at work.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹¹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹²

WHEREFORE, the undersigned Board Member reverses the September 6, 2013, preliminary hearing Order entered by ALJ Klein.

IT IS SO ORDERED.

Dated this ____ day of November, 2013.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: Diane F. Barger, Attorney for Claimant
bargerlaw@prodigy.net

Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
ekuhn@foulston.com

Honorable Thomas Klein, Administrative Law Judge

¹¹ K.S.A. 2012 Supp. 44-534a.

¹² K.S.A. 2012 Supp. 44-555c(k).